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No._____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL CARR

Petitioner

- vs. -

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether The Due Process Clause Of The Fifth Amendment Bars "All or None" Plea Bargain Agreements Which Are Expressly Conditioned On Acceptance By All Co-defendants?

2. Whether Rule 32(d), Federal Rules of Criminal Procedure, Permits An Examination Of The Merits Of A Defense Which Is Proffered As The "Fair And Just" Reason For Withdrawal Of A Plea Of Guilty At The Hearing On The Withdrawal Motion?

TABLE OF CONTENTS

PAGE

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

1. PROCEDURAL SEQUENCE 2

2. FACTS ELICITED IN CONNECTION WITH THE HEARING ON MOTION TO WITHDRAW 4

3. DISPOSITION BY COURT OF APPEALS ... 5

REASONS FOR GRANTING THE WRIT 7

1. THIS COURT SHOULD RESOLVE AN ISSUE OF NATIONAL IMPORTANCE WHICH WAS LEFT UNDECIDED BY THIS COURT IN *BORDENKIRCHER V. HAYES* 7

2. "ALL OR NONE" PLEA BARGAIN OFFERS ARE INHERENTLY COERCIVE AND NECESSARILY CREATE CONFLICTS OF INTEREST IN MULTI-DEFENDANT CASES WHERE CO-DEFENDANTS ARE JOINTLY REPRESENTED 8

3. THIS COURT SHOULD RESOLVE A CONFLICT BETWEEN THE COURT OF APPEALS AND THIS COURT 10

CONCLUSION 12

APPENDIX ..... App. 1

APPENDIX ..... App. 2

TABLE OF CASES

PAGE

Baty v. Balcom, 661 F.2d 391
(5th Cir. 1981) 9

Bergen v. United States, 145 F.2d 181
(8th Cir. 1944) 10

Bordenkircher v. Hayes, 434 U.S. 357,
54 L.Ed.2d 604, 98 S.Ct. 663 (1978) 7

Brady v. United States, 397 U.S. 742,
25 L.Ed.2d 747, 90 S.Ct. 1463 (1970) 7

Dandridge v. United States, 356 U.S. 259,
2 L.Ed.2d 757, 78 S.Ct. 714 (1958) 11

Gearhart v. United States, 272 F.2d 499
(D.C. Cir. 1959) 10

Glasser v. United States, 315 U.S. 60,
86 L.Ed. 680, 62 S.Ct. 457 (1942) 8

Mabry v. Johnson, ___ U.S. ___,
81 L.Ed.2d 437 (1984) 7

McNabb v. United States, 318 U.S. 332,
87 L.Ed. 819, 63 S.Ct. 608 (1943) 9

United States v. Bush, 599 F.2d 72
(5th Cir. 1979) 5

United States v. Diamond, 430 F.2d 688
(5th Cir. 1970) 11

United States v. Hastings, 461 U.S. ___,
76 L.Ed.2d 96 (1983) 9

United States v. Kranzthor, 614 F.2d 981
(5th Cir. 1980) 9

United States v. Laura, 667 F.2d. 365
(3rd Cir. 1981) 8

United States v. Morgan, 567 F.2d 479
(D.C. Cir. 1977) 11

PAGE

United States v. Schubert, 728 F.2d 1364 (9th Cir. 1984) 10

United States v. Taglione, 546 F.2d 194 (5th Cir. 1977) 5

United States v. Thaggard, 477 F.2d 626 (5th Cir. 1973) 5

United States v. Truglio, 493 F.2d 574 (4th Cir. 1974) 8

United States v. Young, 424 F.2d 1276 (3rd Cir. 1970) 11

White v. United States, 396 F.2d 822 (5th Cir. 1968) 9

OPINION BELOW

On August 17, 1984, a panel of the Fifth Circuit delivered its opinion affirming Petitioner's conviction. *See* Appendix 1, *infra*. On September 18, 1984, rehearing was denied. *See* Appendix 2, *infra*. The opinion is reported at 740 F.2d 339 (5th Cir. 1984).

JURISDICTION

Pursuant to Rule 20.1 and 20.4 of this Court's rules, this petition is due to be filed on or before November 13, 1984. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V: "No person . . . shall be . . . deprived of life, liberty, or property, without due process of law . . ."

Rule 32(d), Federal Rules of Criminal Procedure:

> Plea Withdrawal. If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed . . . , the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason . . ."

Rule 44(c), Federal Rules of Criminal Procedure:

> "Joint Representation. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

STATEMENT OF CASE

1. Procedural Sequence

On July 7, 1982, the Petitioner and two co-defendants, Donald McDevitt (an attorney) and Keith Kantor, were indicted for five counts (counts 1-5) of mail fraud, in violation of 18 U.S.C. §1341, and one count (count 6) of conspiracy to defraud the United States, in violation of 18 U.S.C. §371.

Thereafter, on July 16, 1982, Petitioner and his two co-defendants were arraigned. At the time of arraignment, Kantor was represented by counsel, but neither Petitioner nor McDevitt appeared with counsel. The Court entered a plea of not guilty for Petitioner and for McDevitt. Kantor entered a plea of not guilty. Thereafter, the Court continued the case until July 23, 1982, in order for Petitioner and McDevitt to attempt to retain counsel.

On July 23, 1982, Petitioner and McDevitt appeared in court and reported that they were both in the process of retaining Roy Minton and Charles Burton of the Austin firm of Minton, Burton and Foster. Upon learning of the prospect of joint representation, the Court made several comments to Petitioner and McDevitt regarding the possibility of a conflict "between . . . defenses." 3 R. 4-5. The Court reset the case for the following Friday, July 30, 1982.

On July 30, 1982, Petitioner, McDevitt and Kantor appeared in Court. At that time, Roy Minton and his "law partner," Charles Burton, entered their appearance for Petitioner and McDevitt. During the proceeding, the Court told Minton and Burton that they would have to be alert to the possibility of a conflict. 4 R. 6, L. 16-21. Minton responded that he and Burton had talked to Petitioner and McDevitt about the case, that he could not discern that there was any conflict, but if there was a conflict, Petitioner and McDevitt would waive any conflict that there "would be." 4 R. 6-7. The Court responded that any waiver "would depend upon what happens in the case." 4 R. 7. The Court then excused the parties until after pretrial motions had been filed. 4 R. 3-8.

Thereafter, pretrial motions were filed and the case was ultimately continued until October 3, 1983, for a trial.

On October 3, 1983, Petitioner, McDevitt and Kantor appeared in Court. Petitioner and McDevitt were represented by Burton (Minton was not present) and Kantor was represented by his counsel. Def.Ex. 3 at 23, 28-29. Pursuant to "an all or none" plea

bargain agreement, Def.Ex. 3 at 17-18, Petitioner, McDevitt and Kantor were arraigned on Count 6 and pled guilty thereto.[1] Def.Ex. 3 at 2-53. The Court, after admonishing the defendants, found all three guilty and reset the case until October 28, 1983, for sentencing and further proceedings. Def.Ex. 3 at 2-52. At no time, however, did the Court conduct a hearing pursuant to Rule 44(c), Federal Rules of Criminal Procedure, or accept the plea agreement.[2]

On Friday, October 21, 1983, Petitioner mailed a motion for substitution of counsel to the Court. 1 R. 134-135. Said motion was filed on Monday, October 24, 1983. 1 R. 134-135.

On Thursday, October 20, 1983, Petitioner swore to the truth of his motion to withdraw plea of guilty. 1 R. 136-139. That motion to withdraw plea of guilty was mailed to the Court on Monday, October 24, 1983, and was filed on Tuesday, October 25, 1983. 1 R. 136-139.

On October 28, 1983, Petitioner, McDevitt and Kantor appeared in Court pursuant to the Court's previous instructions. 1 R. Docket Sheet at 3; 5 R. 3-30. At that time, the Court considered and granted Petitioner's motion for substitution of counsel. 1 R. Docket Sheet at 3; 5 R. 3-9.

Thereafter, the Court considered Petitioner's motion to withdraw his plea of guilty. 5 R. 9-30. After a hearing, the Court took the motion under advisement and continued the hearing on the motion until November 1, 1983. 1 R. Docket Sheet at 3; 5 R. 22, L. 1-4; 5 R. 28-30.

On November 1, 1983, Petitioner's motion to withdraw his guilty plea was again considered. 1 R. Docket Sheet at 4; 6 R. 3-78. The Court ultimately overruled the motion to withdraw, 1 R. 143; 6 R. 77, and then called the case for sentencing. 6 R. 78-104. The

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[1] The plea bargain agreement is termed "all or none" because the Assistant United States Attorney (hereinafter referred to as prosecutor, for purposes of brevity) told the court that the government would bargain only if all of the defendants entered pleas of guilty: the government would not bargain with only one or two of the defendants. In other words, the agreement was expressly conditioned on the acceptance by all defendants.

The plea bargain agreement also encompassed the dismissal of counts 1 through 5. Def.Ex. 3 at 17-18. Thus, the agreement fell under Rule 11(e)(1)(A), Federal Rules of Criminal Procedure.

[2] *See* 6 R. 80, L. 4-11, where the Court indicated that it had postponed a decision on the acceptance or rejection of the plea agreement until the time of sentencing. *See also* 6 R. 7, L. 4-19, where this point was raised.

Court accepted the plea agreement, 6 R. 80, and sentenced Petitioner, McDevitt and Kantor. 6 R. 78-103. Counts 1 through 5 were then dismissed. 1 R. 142; 6 R. 103.

2. Facts Elicited In Connection With Hearing On Motion To Withdraw

On October 5, 1983, Petitioner visited with an attorney, Bob Travis. 6 R. --, 22-24. Based on that conversation, Travis told Petitioner that "if he did what McDevitt told him to do it would be a point in his favor." 6 R. 25.[3] Accordingly, Travis gave Petitioner the names of lawyers (including Emmett Colvin) from which he could seek legal assistance. 6 R. 28-29.

On October 6, 1983, 6 R. 4, L. 7-8, Petitioner consulted with Emmett Colvin. 6 R. 4. Colvin called Travis on October 6, 1983, and they discussed the existence of a conflict of interest between McDevitt (a lawyer) and Petitioner and the possibility that Petitioner had acted on advice of counsel (from McDevitt and other lawyers) with respect to certain actions alleged in the indictment. 6 R. 27. Travis referred Colvin to the depositions in the corresponding civil cases. 6 R. 27. Travis also recalled discussing with Colvin intent as a defense and Petitioner's reliance on McDevitt's legal advice. 6 R. 28.

On October 9, 10 and 12, 1983, Petitioner and Colvin had additional meetings. 6 R. 4.

On October 17, 1983, Petitioner met with Mr. Burton. 6 R. 4. At that time, Petitioner told Burton that he perceived a conflict between McDevitt and he and that he had employed other counsel. 5 R. 5-6; 6 R. 31.

At the hearing (on November 1, 1983), the Court admitted, *inter alia*, Def.Ex. 2, an affidavit sworn to by Petitioner. 6 R. 12. Although the Court stated that it considered the affidavit conclusionary, 6 R. 12, the essence of the facts contained therein was verified by the testimony of Bob Travis and Charles Burton, 5 R. 5-7; 6 R. 22-29, 31-41, 49-50, to wit: that the "all-or-nothing plea" had built in pressure *and* that Burton never advised Petitioner that

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[3] Travis recalled that he and Petitioner discussed Petitioner's lack of involvement in count 6 and the fact that Petitioner had relied upon McDevitt in his actions relevant to count 6. 6 R. 28.

reliance on advice of counsel was a "defense"[4] to specific intent as to count 6. Indeed, Burton never discussed the "defense" of reliance on counsel with Petitioner abstractly or factually, 6 R. 38, 50, although Petitioner had, at various times, told Burton that "he had done this, that or the other because he had talked to an attorney who said that was the proper way to do it." 6 R. 50, L. 11-13. Burton also admitted that he knew that Petitioner had relied upon McDevitt for "legal theories, tax theories," 6 R. 41, L. 18, but *Burton* did not view Petitioner's relationship with McDevitt as that of attorney-client.[5] 6 R. 41, L. 5-20.

After both sides rested and closed on the motion to withdraw, the Court read extensively from Def.Ex. 3 6 R. 63-72. The Court then made a lengthy ruling regarding the motion to withdraw. 6 R. 72-77. The Court's comments included the following:

> "Of course, the whole thing — and I think where much of the problem relates to is the particular count, the 6. Maybe you ought to let Mr. Carr pled guilty to one of the mail fraud counts on the insurance policies, and he might not have as much objection to that as he does to the tax matter. Maybe that is where the mistake has been made, if there has been a mistake." 6 R. 74, L. 8-13.

3. Disposition By Court Of Appeals

Petitioner presented five interrelated grounds of error to the Court of Appeals, all of which dealt with the legal advice Petitioner had received, the entry of his plea of guilty, and his motion to withdraw his plea. The underlying threads through all five grounds of error were: (1) the government's plea bargain, which was an "all or none" agreement whereby all three co-defendants had to plead

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[4] Technically, good faith reliance on advice of counsel is not a "defense." *United States v. Thaggard*, 477 F.2d 626, 631-632 (5th Cir. 1973). Rather, it is an instruction to the jury telling a jury that it can find that a defendant did not act willfully and with specific intent if he relied in good faith on advice of counsel. However, the Court has considered it as a "defense," *United States v. Bush*, 599 F.2d 72, 78 n. 13 (5th Cir. 1979); *United States v. Taglione*, 546 F.2d 194, 281 (5th Cir. 1977). For purposes of brevity, it is referred to as a "defense" herein.

[5] There was a discussion of whether an instruction on good faith reliance on counsel was appropriate when the attorney upon whom a defendant relied was a co-conspirator. 5 R. 18-20; 6 R. 59, L. 18-24; 6 R. 62-63. As pointed out by Mr. Colvin, the attorney-client privilege would not attach where the crime exception to the attorney-client privilege applied, but the applicability of the attorney-client privilege would not affect the propriety of an instruction on good faith reliance on counsel.

guilty or the government would not bargain with any of them, had placed Petitioner's counsel in a conflict of interest; and (2) joint representation of two co-defendants (Petitioner and McDevitt) where one of those co-defendants (Petitioner) had relied on the legal advice of the other co-defendant (McDevitt), had placed Petitioner's counsel in a conflict of interest.

The Court of Appeals ignored the import of the "all or none" plea bargain agreement. The Court also ignored case law from other Courts of Appeal which dictated that in connection with a motion to withdraw, the merits of the defensive issue proffered as the "fair and just reason" under Rule 32(d), Federal Rules of Criminal Procedure, are not subject to review. Rather, the Court examined the merits of the proffered defense and held that there was not sufficient evidence to justify the conclusion that Petitioner had relied upon his co-defendant's legal advice. Accordingly, the Court reasoned that Petitioner's counsel could not have been laboring under an actual conflict of interest. In reaching its conclusion, the Court again ignored the "all or none" plea bargain agreement and the obvious conflict that plea bargain offer had placed Petitioner's counsel in at the time he (Petitioner's counsel) had to advise Petitioner whether to accept or reject the plea bargain.

REASONS FOR GRANTING THE WRIT

1. THIS COURT SHOULD RESOLVE AN ISSUE OF NATIONAL IMPORTANCE WHICH WAS LEFT UNDECIDED BY THIS COURT IN *BORDENKIRCHER V. HAYES.*

In *Bordenkircher v. Hays*, 434 U.S. 357 at 364 n. 8, 54 L.Ed. 2d 604 at 611 n. 8, 98 S.Ct. 663 (1978), this Court reserved judgment on the constitutional implications of a prosecutor's offer during plea bargaining of adverse or lenient treatment for a person OTHER than the defendant himself. This Court there indicated [citing *Brady v. United States*, 397 U.S. 742, 25 L.Ed.2d 747, 90 S.Ct. 1463 (1970)], that such offers "might pose a greater danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider."

In *Brady v. United States, supra*, the Court considered the assertion:

> "that it violates the Fifth Amendment to influence or encourage a guilty plea by opportunity or promise of leniency and that a guilty plea is coerced and invalid if influenced by the fear of a possibly higher penalty for the crime charged if a conviction is obtained after the State is put to its proof." 397 U.S. at 750-751.

The Court rejected the above assertion, but recognized that coercive actions of the prosecutor or the court could render a plea involuntary. 397 U.S. at 751-753. The Court went on to quote the following as being the standard of voluntariness of a guilty plea:

> "'[A] plea of guilty entered by one fully aware of that direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harrassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).' 242 F.2d at page 115." 397 U.S. at 755, (footnote omitted).

See also Mabry v. Johnson, ___ U.S. ___, 81 L.Ed.2d 437 (1984).

Petitioner asserts that "all or none" plea bargain agreements — agreements expressly conditioned upon acceptance by all co-defendants or the government will not bargain with any of the co-defendants — are inherently coercive and that they have no proper relationship to the prosecutor's business. A defendant who wants to plead guilty and "belly up to the bar of justice" should not be denied the benefit proffered by the prosecutor because his co-defendant persists in asserting his innocence. Conversely, a defendant who persists in asserting his innocence should not be pressured to waive his constitutional rights by his co-defendants who want to plead guilty and receive the proffered benefit but who cannot do so unless they all plead guilty. This "group" treatment is fundamentally unfair and "more than a little unwholesome." *United States v. Laura*, 667 F.2d 365 at 380 (3rd Cir. 1981) (Stein, D.J., dissenting). Quite simply, it is not the process due any citizen accused of a crime, regardless of whether the prosecutor is federal, state, county or city.

2. "ALL OR NONE" PLEA BARGAIN OFFERS ARE INHERENTLY COERCIVE AND NECESSARILY CREATE CONFLICTS OF INTEREST IN MULTI-DEFENDANT CASES WHERE CO-DEFENDANTS ARE JOINTLY REPRESENTED

Although "all or none" plea bargain agreements may appear and actually be efficient devices to elicit waivers of constitutional rights in multi-defendant cases, they are inherently coercive and necessarily create conflicts of interest. No only must each defendant and his counsel analyze the government's case as to that defendant so as to ascertain whether to accept or reject the offer, they must also attempt to influence and persuade the other defendants and their attorneys that they too should accept or reject the offer. Aside from the possible ramifications of such action with regard to obstruction of justice (e.g., 18 U.S.C. §1505), additional unsavory side effects result. For example, where one attorney represents two of three co-defendants and the two co-defendants have different levels of culpability and involvement, the existence of an "all or none" plea offer places that attorney in an inherent, undeniable conflict of interest. *See* e.g., *Glasser v. United States*, 315 U.S. 60 at 76, 86 L.Ed. 680, 62 S.Ct. 457 (1942) and *United States v. Truglio*, 493 F.2d 574 (4th Cir. 1974) (one attorney represented five co-defendants, government made a "package" deal contingent on acceptance of all five; conflict entitled defendant to withdrawal). The

creation of that conflict of interest, by virtue of the prosecutor's offer, is even more apparent when, as in the present case, one of the two co-defendants jointly represented by counsel claims that he relied upon the legal advice of the other co-defendant. *See* e.g., *United States v. Kranzthor*, 614 F.2d 981, 983 (5th Cir. 1980); *White v. United States*, 396 F.2d 822, 823 (5th Cir. 1968).

Although district judges could utilize Rule 44(c), Federal Rules of Criminal Procedure, to ensure that co-defendants are separately represented by independent counsel when a prosecutor has made an "all or none" plea offer, Rule 44(c) cannot be used to eliminate the inherently coercive effect that "all or none" plea bargain offers entail. Similarly, the separation of powers doctrine may prohibit this Court from restraining federal prosecutors from employing such "all or none" plea offers.[6]

Petitioner recognizes that there may be instances where a prosecutor's "all or none" offer may not create a significant conflict and may not have a significant coercive effect. Where, however, co-defendants in a multi-defendant case are jointly represented by counsel and the co-defendants jointly represented have different levels of culpability, the conflict and coercive effect are inherent. The exact level of coercive effect will vary dependent upon each particular defendants' feelings regarding a waiver of right to trial, self-incrimination, confrontation etc. However, an actual conflict, by definition, will necessarily result. *See* e.g., *Baty v. Balkcom*, 661 F.2d 391 at 397 n. 12 (5th Cir. 1981).

The quick, clean, simple and painless[7] solution is to eliminate "all or none" plea bargain offers. Although this Court could exercise its supervisory powers over federal courts[8] and "outlaw" "all or none" plea bargain offers, it appears that such offers are violative of due process. Indeed, no prosecutor should have the power and apparent ability to coerce a guilty plea and waiver of constitutional rights from a defendant by recourse to "all or none" plea offers. Admittedly, many defendants do in fact plead guilty after their

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[6] This statement is based only on the assumption that "all or none" plea bargain offers are not violative of the Constitution.

[7] The government loses nothing except its ability to deprive co-defendants of their constitutional rights through unconstitutional or unacceptable means.

[8] *See McNabb v. United States*, 318 U.S. 332, 345, 87 L.Ed. 819, 63 S.Ct. 608 (1943); *United States v. Hastings*, 461 U.S. ___, 76 L.Ed.2d 96 (1983).

co-defendants "cut a deal" and agree to testify against them, but there is nothing unsavory or repulsive about that. On the other hand, offering a benefit to all co-defendants contingent on acceptance by all is just plain unfair and coercive. This Court should strip all prosecutors, federal, state, county and city, of their present ability to coerce guilty pleas and waivers of constitutional rights through "all or none" plea offers by holding that such offers violate the due process clause of the Fifth and Fourteenth Amendments.

3. THIS COURT SHOULD RESOLVE A CONFLICT BETWEEN THE COURTS OF APPEAL AND THIS COURT

In the present case, the District Court, over Petitioner's objections and regardless of citation of authority, permitted the government to elicit evidence relating to the merits of the "defense" proffered as one of the "fair and just" reasons[9] in support of the motion to withdraw. Similarly, the Fifth Circuit extensively examined the merits of the proffered defense and, on the basis of its conclusion that on that evidence Petitioner would not be entitled to a jury instruction at trial, concluded that no "fair and just" reason had been proffered. The Fifth Circuit examined the merits of the defense despite citation of authority.

At least four Courts of Appeal have held that where a defendant proffers a defense as the "fair and just" reason in support of a motion to withdraw, the merits of the defense are not subject to review. *See United States v. Schubert*, 728 F.2d 1364, 1366 (9th Cir. 1984); *Bergen v. United States*, 145 F.2d 181 (8th Cir. 1944); and *Gearhart v. United States*, 272 F.2d 499, 502 (D.C. Cir. 1959),

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[9] Appellant submitted the following as fair and just reasons:

(1) He was not apprised by his counsel (Burton and Minton) of the "defense" of good faith reliance on counsel (as it affects specific intent), prior to the entry of his plea (due to a conflict of interest);

(2) Absent knowledge of that "defense," he could not knowingly and intelligently have waived his constitutional right to trial by jury, self-incrimination, etc.;

(3) He was innocent of the offense alleged in count 6;

(4) His plea was a mistake due to his ignorance of the "defense" of good faith reliance on counsel;

(5) He had yielded to the inherent pressure of an "all or none" plea agreement;

(6) There was no factual basis in the plea transcription to support the requirement that the Appellant possessed the specific intent necessary to have committed the alleged offense.

Appellant's Br. at 23.

which was followed in *United States v. Morgan*, 567 F.2d 479, 493 (D.C. Cir. 1977) and *United States v. Young*, 424 F.2d 1276, 1280 (3rd Cir. 1970).

Furthermore, under this Court's memorandum opinion in *Dandridge v. United States*, 356 U.S. 259, 2 L.Ed. 2d 757, 78 S.Ct. 714 (1958), it appears[10] that this Court has previously held that the merits of a proffered "fair and just" reason are not subject to review.

It should be noted that Petitioner did not testify at the hearing on the motion to withdraw (i.e., he did not personally attempt to rebut the government's evidence that the "defense" of good faith reliance on counsel would not be available to Petitioner at trial). Petitioner did not testify because there was uncontroverted evidence that he did in fact rely upon legal advice from his co-defendant (McDevitt, an attorney), *and* other attorneys. The Fifth Circuit ignored the evidence of reliance on other attorneys, but concluded that Petitioner's reliance upon McDevitt's legal advice would not entitle him to a jury instruction due to the applicability, in essence, of the crime-tort exception to the attorney-client evidentiary privilege. The Court not only viewed the merits of the defense, but misapplied federal law to create an irrebuttable presumption that no co-defendant can ever obtain a jury charge on good faith reliance on counsel when he relies on an attorney who is also indicted, a holding in conflict with *United States v. Diamond*, 430 F.2d 688 (5th Cir. 1970) [defendant entitled to jury instruction on good faith reliance on counsel even though legal advice was from an alleged co-defendant (Zinn) whose case had previously been dismissed].

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[10] In *Dandridge, supra*, the Solicitor General conceded to this Court that where an accused seeks to withdraw his plea of guilty on the basis that the accused was not mentally competent at the time he had pleaded guilty, a hearing in the district court on the issue would be appropriate. This Court, however, did not remand the case for a hearing. Rather, the case was remanded ". . . with directions to permit the defendant to change his plea." *See Gearhart v. United States, supra* at 502.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 83-1829

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL CARR,

Appellant.

Appeal from the United States District Court
For the Northern District of Texas

(August 17, 1984)

Before GARZA, GARWOOD, and HIGGINBOTHAM, Circuit Judges. GARZA, Circuit Judge:

FACTS

Between November 1978, and July 1982, the appellant and two co-defendants conducted various schemes to defraud life insurance companies of commissions on policies and sold false income tax deductions to various business enterprises. The tax fraud conspiracy that formed the basis of appellant's guilty plea was instigated as a means of avoiding federal income tax on the fraudulently acquired

insurance commissions. Appellant then marketed the income tax scheme to third parties as a technique to evade tax liability.[1]

Appellant Carr, Donald McDevitt (an attorney), and Keith Kantor were indicted on July 2, 1982, on five counts of mail fraud in violation of 18 U.S.C. §1341, and conspiring to defraud the United States by impeding the functions of the IRS in violation of 18 U.S.C. §371. The three were arraigned on July 16, 1982. Appellant and McDevitt appeared without counsel, they were admonished of their rights, the applicable range of punishment, and the court entered a plea of not guilty for them. At the hearing on July 23, 1982, appellant and McDevitt appeared in court and stated that they were in the process of retaining Roy Minton and Charles Burton as their attorneys. When the court learned of the prospect of joint representation, it warned both attorneys, appellant, and McDevitt about the possibility of a conflict between defense strategies. At the July 30, 1982 hearing the court pursued the possible conflict of interest further. The following exchange occurred:

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[1] To facilitate the scheme the defendants formed dummy companies for the purpose of appointing corporate officers who supposedly needed substantial life insurance policies. Using a West Indian bank they had acquired, they transmitted false loan commitment letters, promissory notes, and financial statements to insurance carriers to induce them to write the insurance policies and pay the defendants the agency commissions. The defendants also gave the carriers false data concerning the net worth of the individuals to be insured. Moreover, they falsely represented that they were collecting premiums for the policies issued when they were using the commissions they received to pay for the insurance. Finally, in an effort to appear as the victim of harassment from one of the insurance companies they had bilked, appellant and Kantor had "buggin" devices planted in their homes and retained an attorney to report the alleged incident to the Federal Bureau of Investigation.

To facilitate the tax fraud scam the defendants entered fictitious business consultation contracts with various individuals. For example, McDevitt completed a consultation agreement on behalf of a defunct Bahamian corporation he had formed, even though no consultation was ever performed. Appellant, the co-defendants, and the purchasers of their service, agreed that in case of an audit by the Internal Revenue Service they would fabricate false business consultation documents.

To mask the plan, the "consultees" advanced the defendants a consultation fee in the amount of their taxable income. The defendants retained ten percent of that fee, which they kept as their profit, and returned the remaining ninety percent in a loan from the defunct Bahamian corporation or West Indian Bank. Thus, it would appear that the "consultees" had legitimate business tax deductions to offset their taxable incomes. To further legitimize the scam all the defendants met with potential customers, outlined the plan, and got some of the targeted customers to participate.

THE COURT: I know you are familiar with the fact, of course, both lawyers representing — the same lawyer representing both defendants, there's always that possibility of conflict arising. I have no knowledge of whether there's any such conflict or not, but that's just something you'll have to look for.

MR. MINTON: For the record, if I may, Judge, we talked to both of our clients at length about that.

THE COURT: Yes.

MR. MINTON: Mr. McDevit is an attorney, and —

THE COURT: Yes, sir.

MR. MINTON: — and we went into that in great detail with them. I cannot discern that there is any conflict; but, if there is, they both waive any conflict that there would be. Is that right gentlemen?

DEFENDANTS CARR, McDEVITT: Yes (in unison).

THE COURT: Of course, that would depend upon what happens in the case.

MR. MINTON: Yes, I understand.

THE COURT: But I wanted to, for the record, have all those things brought up at this time.

Hearing of July 30, 1982, Rec. vol. IV., at 6-7.

Following the July 30 hearing, the court granted three defense motions for continuances. The trial was scheduled to commence on Monday, October 3, 1983. During the weekend of October 1-2, however, the prosecutor and counsel for the defendants negotiated a guilty plea agreement predicated upon a factual resume to support the anticipated pleas. On the morning the trial was to begin, defense counsel announced that the defendants were prepared to enter pleas

of guilty to the tax fraud conspiracy count in exchange for dismissal of the remaining counts. The government's obligation under the agreement, to seek dismissal of the remaining charges, was conditioned upon entry of guilty pleas by all three defendants on the conspiracy count, the so called "all or nothing" requirement. Pursuant to this agreement all three defendants pled guilty to count six of the indictment and were found guilty by the court.

On October 24, 1983, appellant filed a motion for substitution of counsel. On October 25, 1983, he filed a motion to withdraw his plea of guilty on the grounds that he had had a viable defense that he had previously been unaware of, and that he had been pressured into pleading guilty because of the "all or nothing" requirement. Although Burton had admittedly questioned appellant regarding reliance upon such advice, it was alleged that he failed to inform him that advice of counsel could constitute a defense to the charge in question. After granting appellant's motion to substitute counsel, the district court conducted a hearing on his motion to withdraw guilty plea on November 1, 1983.

After reviewing appellant's responses to questions asked during the plea inquiry pursuant to Fed. R. Crim. P. 11 the district court overruled that motion and then called the case for sentencing. The court accepted the plea agreement and sentenced appellant to three years confinement and a $2,500.00 fine. Counts one through five were then dismissed. Appellant filed a notice of appeal on November 1, 1983.

ISSUES

Appellant complains that the district court abused its broad discretion in denying his motion to withdraw his guilty plea pursuant to Fed.R.Crim.P. 32(d).[2] He argues that a withdrawal is justified because his trial attorney failed to inform him that he could use an "advice of counsel" defense to the conspiracy charge against him. Since he was not advised of this defense prior to the entry of the plea, he now claims that the plea was entered improvidently and

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[2] "(d) **Plea Withdrawal.** If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, imposition of sentence is suspended, or disposition is had under 18 U.S.C. § 4205(c), the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. §2255."

that he sould be permitted to plead anew so as to take advantage of the defense. We find appellant's contention devoid of merit, and therefore affirm the district court.

The Standard for Withdrawal of a Guilty Plea

The standard for determining whether or not a defendant may withdraw his guilty plea prior to sentencing is whether "for any reason the granting of the privilege seems fair and just." *United States v. Rasmussen*, 642 F.2d 165, 167 (5th Cir. 1981) (quoting *Kercheval v. United States*, 274 U.S. 220, 224, 47 S.Ct. 582, 583, 71 L.Ed. 1009, 1012 (1927)); *United States v. Pressley*, 602 F.2d 709, 711 (5th Cir. 1979). Federal courts have uniformly applied this well established standard. *United States v. Barker*, 514 F.2d 208, 219 (D.C. Cir.), *cert. denied*, 421 U.S. 1013, 95 S.Ct. 2420, 44 L.Ed.2d 682 (1975); *See generally*, Note, *Presentence Withdrawal of Guilty Pleas in the Federal Courts*, 40 N.Y.U.L.Rev. 759 (1965).

Courts have considered various elements and factors when applying this standard. The factors that should be considered when applying this standard are: (1) whether or not the defendant has asserted his innocence;[3] (2) whether or not the government would suffer prejudice if the withdrawal motion were granted;[4] (3) whether or not the defendant has delayed in filing his withdrawal motion;[5] (4) whether or not the withdrawal would substantially inconvenience the court;[6] (5) whether or not close assistance of counsel was available;[7] (6) whether or not the original plea was knowing and voluntary;[8] and (7) whether or not the withdrawal would waste judicial

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[3] *Rasmussen* at 168; *Barker* at 221.

[4] *Rasmussen* at 168; *Barker* at 222.

[5] *See Barker* at 221.

[6] *United States v. Morrow*, 537 F.2d 120, 146 (5th Cir. 1976), *cert. denied sub nom., Brennan v. United States*, 430 U.S. 956, 97 S.Ct. 1602, 51 L.Ed.2d 806 (1977); *Barker* at 222; *Everett v. United States*, 336 F.2d 979, 984 (1964).

[7] *United States v. Rodriguez-DeMaya*, 674 F.2d 1122, 1128 (5th Cir. 1982); *United States v. Pressley*, 602 F.2d 709, 711 (5th Cir. 1979); *Morrow* at 146; *Rosas v. United States*, 505 F.2d 115 (5th Cir. 1974), *cert. denied*, 421 U.S. 1001, 95 S.Ct. 2402, 44 L.Ed.2d 670 (1975).

[8] *Rodriguez-DeMaya* at 1128; *Pressley* at 711; *Morrow* at 146; *United States v. McCoy*, 477 F.2d 550, 551 (5th Cir. 1973).

resources;[9] and, as applicable, the reason why defenses advanced later were not proffered at the time of the original pleading,[10] or the reasons why a defendant delayed in making his withdrawal motion.

When courts apply the factors enumerated above they should consider the totality of the circumstances. *United States v. Morrow*, 537 F.2d 120, 146 (5th Cir. 1982). Certain guidelines are helpful. For example, the longer a defendant delays in filing a withdrawal motion, the more substantial reasons he must proffer in support of his motion. *Barker* at 222. In addition, "[t]he movant's reasons must meet exceptionally high standards where the delay between the plea and the withdrawal motion has substantially prejudiced the Government's ability to prosecute the case." *Barker* at 222 (citing *United States v. Vasquez-Velasco*, 471 F.2d 294 (9th Cir.), *cert. denied*, 411 U.S. 970, 93 S.Ct. 2163, 36 L.Ed.2d 692 (1973)). Conversely, a prompt withdrawal may indicate that a plea was unknowingly entered in haste. It should also be remembered that the defendant has the burden of proving the withdrawal is justified. *Everett v. United States*, 336 F.2d 979, 984 n.17 (D.C. Cir. 1964); *see United States v. Webster*, 468 F.2d 769, 771 (9th Cir. 1972), *cert. denied*, 410 U.S. 934, 93 S.Ct. 1385, 35 L.Ed.2d 597 (1973); *Callaway v. United States*, 367 F.2d 140, 142 (10th Cir. 1966) (per curiam).

Finally, the trial court's decision regarding a withdrawal motion must be accorded "broad discretion." *United States v. Morrow*, 537 F.2d 120, 146 (5th Cir. 1976), *cert. denied sub nom. Brennan v. United States*, 430 U.S. 956, 97 S.Ct. 1602, 51 L.Ed.2d 806 (1977). As we have stated:

> it is well settled that there is no absolute right to withdraw a guilty plea before the imposition of sentence. Instead, the right to do so is within the sound discretion of the trial court which will be reversed by an appellate court only for an abuse of that discretion.

Rasmussen at 167 (citing *Morrow; United States v. Simmons*, 497 F.2d 177 (5th Cir.), *cert. denied*, 419 U.S. 1048, 95 S.Ct. 623, 42 L.Ed.2d 643 (1974)).

Applying the Standard to Appellant's Motion

Considering the totality of the circumstances and factors involved in this case we find that the trial court did not err in denying appellant's withdrawal motion. First, although the defendant has

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[9] *Rodriguez-DeMaya* at 1128; *Pressley* at 711.

[10] *Rasmussen* at 168; *Barker* at 221.

asserted his innocence, this claim alone is far from being sufficient to overturn denial of a withdrawal motion. Otherwise, the mere assertion of legal innocence would always be a sufficient condition for withdrawal, and withdrawal would effectively be an automatic right. *See Barker* at 221.

Second, although overturning the district court would appear not to prejudice the government's case, "we do not believe that the absence of a showing of prejudice to the government by itself, should be sufficient to mandate permission to withdraw a plea when, as here, no credible reason is proffered." *Rasmussen* at 168 n.6. When we consider the other factors present in this case the fact that the defendant has asserted his innocence and the government will not suffer prejudice does not justify reversing the district court.

As to the third factor, appellant's delay in filing his withdrawal motion, we find that the motion was not promptly filed. The defendant waited twenty-two days before filing his motion for withdrawal of his guilty plea — only three days before sentencing. The rationale for allowing a defendant to withdraw a guilty plea is to permit him to undo a plea that was unknowingly made at the time it was entered. The purpose is not to allow a defendant to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes that he made a bad choice in pleading guilty. *Everett* at 984.

An examination of the record regarding the fourth factor reveals that permitting the defendant to withdraw his plea would have substantially inconvenienced the court. The court had expected the trial to take two to three weeks. Rescheduling such a lengthy trial would have inconvenienced the trial court by disrupting its docket. *See* Hearing on Motion to Withdraw Guilty Plea, Rec. vol. VI, at 74-75. This conclusion is especially true because the court would had to have given the case priority over other pending civil actions because it was a criminal case.

Applying the fifth factor to this case indicates that the district court was correct in refusing to allow any motion for withdrawal. Appellant not only had close assistance of counsel but had close assistance of highly effective counsel. As the district court noted, "there's no better counsel in Texas than Roy Minton and Mr. Burton . . . they are extremely experienced criminal attorneys in defense matters." *Id.* at 73.

Appellant contends that considering the sixth factor his withdrawal should be allowed because his plea was not knowing and

voluntary. Appellant argues that because he was unaware of his counsels' conflict of interest and that a possible defense was available to him his guilty plea was not voluntarily, knowingly, and intelligently made, especially since he faced an "all or none" plea agreement. We disagree with appellant's interpretation of the facts. Appellant had very experienced attorneys. He was intelligent, and as a licensed life insurance agent with a college background he was able to understand the elements and nature of the offense to which he plead. In response to the district court's inquiries, he acknowledged that: 1) he "fully and thoroughly underst[oo]d the charges against [him]." Rearraignment Proceedings, Oct. 3, 1983, Defendant's exhibit No. 3, at 19; 2) he "underst[oo]d the elements of the offense, *id.* at 43; 3) he had "discuss[ed] in detail the charges with [his] attorney," *id.* at 19; and 4) he admitted "doing what he was charged with doing." *Id.* at 45. Finally, the district court's comments are instructive: "I saw the demeanor. I saw the actions of all defendants. There was just no question in the Court's mind but what everyone thoroughly and clearly understood what was being said, what was done in this case as I accepted the plea of guilty." Hearings on Motion to Withdraw Guilty Plea, Rec. vol. VI, at 72, 74. Appellant's arguments that he did not understand the government's factual resume are meritless. We conclude that he entered a knowing and voluntary plea agreement.

As to the seventh factor, the district court was correct in denying the withdrawal motion because to do otherwise would have wasted judicial resources. The district court's assessment of this factor is entitled to substantial deference since it is in the best position to know the effect that the withdrawal had on its resources. Judge Mahon noted that denying the withdrawal motion would conserve judicial resources because:

> [h]ere is a case of great magnitude. The court had set aside two to three weeks to try the case, and just a few days before I granted a continuance in a backup case to it because this one was going to take two or three weeks to try, and I had been informed by Mr. Eddins and the attorneys — in fact, daily I asked Mr. Eddins if there was any chance, and I believe it was Saturday night, as I recall — it was already dark. I was home — that he called and said, 'I have got some good news. It looks like we've got a plea agreement worked out, and we may not have to have that two or three

> week trial.' And that's the first knowledge this court had of any such situation, and we didn't even get it in time to call off the jurors, as I recall. We had the whole basement jury room full of jurors on that day. Normally, if we think there is going to be a plea agreement, we are not going to trial, all of our jurors call in on Friday after 5:00 o'clock. Well we didn't get word before Friday at 5:00 o'clock that we were going to have a plea, so we had a number of jurors for this panel here to be — from which the jury was to be selected.
>
> The defendant entered into a plea agreement, and, of course, it goes without saying that still there was a lot of expenditures expended with the jurors and certain witnesses that were already here. Not quite all the witnesses were here at that time.

Id. at 74-75. Allowing appellant to withdraw his guilty plea some twenty-two days later, after substantial court resources had been wasted by his initial guilty plea, was well within the district court's discretion. Moreover, denying a withdrawal motion when it would waste judicial resources "protects the rights of other accused persons awaiting trial, whose cases may lose both their position on the calendar . . ." *Everett* at 984.

In examining the last factor, why appellant did not proffer defenses now offered, we find that he had no valid excuse. In judging appellant's reasons for delay, we agree with the Ninth Circuit that "the standard for judging the movant's reasons for delay remains low where the [withdrawal] motion comes only a day or so after the plea was entered." *Barker* at 222. Since appellant's motion came twenty-two days after he entered his guilty plea, he must meet a more demanding standard.

Appellant argues that he did not proffer the defense[1] of advice of counsel because his attorney did not inform him that such a defense was possible. Appellant contends that he was in an attorney-client relationship with McDevitt at the time the events that lead to the filing of this criminal action unfolded. The evidence overwhelmingly indicates, however, that the reason that his attorney

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[1] Strictly speaking, good faith reliance on advice of counsel is not really a defense to an allegation of fraud but is the basis for a jury instruction on whether or not the defendant possessed the requisite specific intent. *See Shushan v. United States*, 117 F.2d 110, 118 (5th Cir. 1941); *Hawkins v. State*, 656 S.W.2d 70, 72-73 (Tex.Cr.App. 1983) (en banc).

did not advise him of such a defense is that such a defense was beyond the realm of a legally cognizable defense under the facts of this case. Charles Burton, one of appellant's able attorneys, testified that his examination of the facts never revealed that such a defense was viable. Before appellant entered his plea, Burton questioned him about whether or not he had relied on McDevitt's advice as his attorney. Hearing on Motion to Withdraw Guilty Plea, Rec. vol. VI, at 36. Burton represented appellant for fifteen months, and testified that:

> There were hours of conversations between the three defendants and others concerning ideas and plans and speculations about things which might be done, but in none of those conversations did it appear to me or occur to me nor did Mr. Carr advance the theory or suggest to me that he was seeking advice from Mr. McDevitt as an attorney . . .
>
> Well, my understanding of the defense is that, if an individual who has planned action in mind goes to an attorney and makes full disclosure of his intent and the attorney informs him that it's proper and legal, that that may be a defense to the conduct that he carries out. I simply never saw those facts *or anything close to those facts* in this case . . . Certainly there was exchange of information, discussion of legal theories, tax theories throughout this period of time, but I did not view Mr. Carr and Mr. McDevitt as having attorney client relationship, insofar as the events for which they were indicted and tried.

Id. at 35, and 41 (emphasis added).

The record reveals that counsel was correct in believing that the advice of counsel defense was meritless. "Advice of counsel, when given on full disclosure of all the facts and followed in good faith, may be a matter to be considered by the jury in determining the appellants' guilt." *United States v. Thaggard*, 477 F.2d 626, 632 (5th Cir.), *cert. denied*, 414 U.S. 1064, 94 S.Ct. 570, 38 L.Ed.2d (1973). For such a defense to be permitted, however, there must be at least some evidence that the attorney advised the defendant as his counsel. *See, e.g., Shushan*, 117 F.2d at 118. When the lawyer is a partner in a venture, takes a share of the profits, or is "not a lawyer who had not interest save to give sound advice for a reasonable fee" the advice

of counsel defense is unavailable. *Id.* The advice of counsel defense is also not permissible when defendants

> retain . . . counsel to insure the success of their mendacious scheme, not to secure legal advice, [or when t]he attorneys in question merely implemented in the most expeditious manner the plan concocted by their clients, . . . [or when the] facilitation of [a] scheme was the essence of the attorney-client relationship in controversy.

United States v. Shewfelt, 455 F.2d 836, 839 (9th Cir.), *cert. denied*, 406 U.S. 944, 92 S.Ct. 2042, 32 L.Ed.2d 331 (1972). Finally, "where defendants know that their conduct is violative of state law, their wrongful purpose, *ab initio*, established beyond a reasonable doubt, leaves them in no position to [utilize the advice of counsel defense] to claim that they had no intention of violating a federal statute which, in fact, denounced the unlawful conduct as also constituting a federal crime." *United States v. Thaggard*, 477 F.2d at 632.

The record in this case reveals that McDevitt was intregally involved in the sham operation. He shared in the profits of the scheme. Re-arraignment Proceedings, Oct. 3, 1983, Defendant's exhibit No. 3, at 39. In addition, he actively promoted the operation by conducting meetings. *Id.* at 41-42. Finally, there is little, if any, evidence that McDevitt was ever asked, or gave, advice in the context of an attorney-client relationship.[12] On these facts, there is not enough evidence to justify an advice of counsel defense. Thus, the court was correct in denying appellant's withdrawal motion, which was based on this ground.

Effective Assistance of Counsel

Appellant's second point of error is that he was denied his sixth amendment right to effective, conflict-free counsel. Appellant urges that his counsel, Minton and Burton, labored under a conflict of interest because of: (1) their joint representation of appellant and

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[12] Indeed, appellant's affidavit on its face may be inadequate as it merely states that "[a]t all times during the indictment period, I was advised by Don McDevitt and other attorneys that the transactions in which I was involved and upon which I acted were legal." This statement fails to indicate that appellant fully and honestly set forth all the facts to McDevitt, sought his advice as an attorney, and honestly relied on such advice.

McDevitt, one of the other co-defendants; (2) the failure of appellant's counsel to explore and develop the defense of good faith reliance on counsel; and, (3) the all or none plea agreement, which allegedly resulted in counsel advising appellant to plead guilty.

Appellant also argues that the district court failed to follow Rule 44(c) Fed.R.Crim.P. because the court failed to "personally advise" the appellant of his rights. In addition, appellant contents that the two counsel, which were both members of the same law firm, failed to develop the defense of good faith reliance on counsel because to do so they would have had to have shifted responsibility to McDevitt. Appellant posits that this situation placed the attorneys in an inherent conflict of interest situation. Finally, appellant maintains that Burton's advice to him regarding the all or none plea agreement was conflict of interest because of the good faith reliance on counsel defense available to appellant. Appellant states that the "all or none" plea agreement was:

> the only apparent way out of the conflict for Minton and Burton . . . If Burton and Minton had continued to represent the appellant and McDevitt after the guilty plea, they would have to have stressed the appellant's reliance on McDevitt and the appellant's relative lack of involvement in count six at sentencing. Otherwise, the appellant would not have received effective assistance of counsel. If they had done so, however, McDevitt would have been prejudiced.

Appellant's brief, at 34.

In examining the first of appellant's contentions we must apply a well established standard governing conflict of interest claims. This standard provides that "in order to establish the violatin of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333, 346-47 (1980). We have held that "[a] conflict of interest is present whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to a codefendant whom counsel is also representing." *Foxworth v. Wainwright*, 516 F.2d 1072, 1076 (5th Cir. 1975). *Accord, e.g., United States v. Benavidez*, 664 F.2d 1255, 1250 (5th Cir.), *cert.*

denied, 457 U.S. 1135, 102 S.Ct. 2963, 73 L.Ed.2d 1352 (1982). In assessing whether or not such conditions are present in a particular case the attorney representing both defendants "is in the best position professionally and ethically to determine when a conflict of interest exists . . ." *Cuyler,* 446 U.S. at 347, 100 S.Ct. at 1717, 64 L.Ed. 2d at 346.

There can be little doubt that in this case the two partners representing appellant and McDevitt did not have any actual conflict of interest. As noted in our recitation of the facts, the trial court repeatedly and effectively pursued the posibility of a conflict of interest between the lawyers. Both attorneys stated that they were certain that there was no conflict of interest. Hearing of July 30, 1982, Rec. vol. IV, at 7. In addition, at the November 1, 1983, hearing to set aside the guilty plea appellant's counsel also again represented to the court that there was no perceived conflict of interest. Hearing on Motion to Withdraw Guilty Plea, Rec. vol. VI, at 53-54. Finally, as noted previously, Burton made it clear at the Hearing on the Motion to Withdraw Guilty Plea that there was simply no probative evidence regarding a possible advice of counsel defense.

During the July 30, 1982 hearing, the court asked counsel whether or not he had: discussed the matter of joint representation with appellant and McDevitt, obtained their assurances that there were no discernible conflicts, and extracted waivers of any conflict from appellant and McDevitt. Rec. vol. IV, at 6-7. The court, however, failed to "personally advise" each defendant of his rights as required by the Rule. *See* Fed.R.Crim P. 44(c). Therefore, the literal requirements of the rule were not complied with fully. *See United States v. Benavidez,* 664 F.2d at 1258. Nevertheless, as we held in *Benavidez,* even if the trial court fails to comply fully with the mandates of Rule 44(c), "a defendant must still demonstrate an 'actual conflict of interest' before [a court] will reverse his conviction." *Id.* at 1259. As we have noted above there was no basis for an advice of counsel defense. Thus, appellant had no grounds for asserting a defense that would have diverged significantly from McDevitt's interests. Accordingly, there was no actual conflict of interest and the district court's failure to comply with the literal requirements of the rule is inconsequential.

Appellant's third ground of error is that he was denied his sixth amendment right to effective assistance of counsel because Minton

and Burton allegedly failed to investigate a potential and plausible defense of good faith reliance on counsel.

In analyzing the failure to investigate issue we must follow the Supreme Court's recent pronouncements in *Strickland v. Washington*, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In *Strickland*, the Court held that:

> counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments . . .
>
> [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

104 S.Ct. at 2066, 80 L.Ed.2d at 695-96. On the facts of this case, counsel's failure to investigate the advice of counsel defense was reasonable because an attorney is under no duty to investigate frivolous, implausible, or meritless defenses. *See Bradbury v. Wainwright*, 658 F.2d 1083 1088, 87 (5th Cir. 1981) (unit B), *cert. denied*, 456 U.S. 992, 102 S.Ct. 2275, 73 L.Ed.2d 1288 (1982).

Finally, even where a defendant shows that counsel erred in failing to investigate a plausible defense, such a mistake does not justify reversal of his conviction if the error had no effect on the judgment. *Strickland v. Washington*, 104 S.Ct. at 2067, 80 L.Ed.2d at 696; *see Dufresne v. Moran*, 729 F.2d 18, 25 (1st Cir. 1984). Since the advice of counsel defense was absolutely meritless, obviously appellant has not come close to showing that the failure to investigate that defense affected his judgment in any way. Therefore, appellant was not denied effective assistance because his attorney did not investigate the advice of counsel defense.

Rule 11(f)

Appellant's fourth ground of error is that the district court failed to comply with Rule 11(f) of the Federal Rules of Criminal Procedure. Appellant argues that the court's 11(f) inquiry failed to determine whether or not the appellant understood the nature of the mental element required by 18 U.S.C. §371 so as to conclude that

the requisite factual basis existed for the acceptance of the plea. During the 11(f) proceeding the court stated:

> So the first element is that there has got to be this agreement or scheme that is referred to as a conspiracy, that it was willfully formed and it was existing during this period of time. That's the first element.
>
> The second element is that you willfully became a part of that agreement; you became a member of the group.

Defendan'ts Exhibit No. 3, at 43.

We disagree with appellant's interpretation of the facts. As we have already noted, the evidence in the record indicates that the appellant understood fully the charge to which he was pleading, including the element of mental intent. Any question as to appellant's knowledge of the scienter requirement was resolved by the factual resume which stated that the offense involved a conspiracy *knowingly* to defraud the government "by manufacturing false and fraudulent tax deductions." Anyone with appellant's level of education and degree of sophistication in the insurance industry and business world would know that such allegations entailed specific fraudulent intent and were antithetical to a defense of good faith.

Entry of the Plea

Appellants' fifth ground of error is that he did not enter his plea voluntarily, knowingly, and intelligently. Appellant argues that his previous grounds of error including the conflict of interest, his lack of knowledge regarding a plausible defense available to him and the knowledge of the mental state required by 18 U.S.C. §371 when considered together indicate that he made an involuntary plea. As discussed earlier, in connection with the factors to be considered in deciding whether or not to allow a defendant to withdraw a guilty plea, we find that the appellant's plea was knowingly, intelligently, and voluntarily made. Considering the totality of the circumstances and the discretion due the district court we find the denial of the withdrawal motion was proper.

Having considered all of appellant's arguments and finding them meritless, the entire opinion of the district court is affirmed.

AFFIRMED.

APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 83-1829

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL A. CARR,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas

ON PETITION FOR REHEARING

(SEPTEMBER 18, 1984)

Before GARZA, GARWOOD, and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

Witt Garwood
United States Circuit Judge
September 13, 1984

FILED
NOV 23 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-767

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL CARR

Petitioner

- vs. -

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX

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THE COURT: The Court has seriously considered this motion from every facet. I have read the cases. I have read the briefs. I have listened to the arguments.

There is no absolute right to withdraw a guilty plea. Of course, it must turn on the particular facts of every case. And based on all the allegations, based on the arguments and all the evidence and the record that's in this case, the defendant's motion to withdraw his plea of guilty is hereby overruled and denied.

Based on the case of U.S. versus Presley, 602 Fed. 2nd 709, which is a Fifth Circuit '79 case, the court points out one where the close assistance of counsel was available. There's no question, this man, there's no better counsel in Texas than Roy Minton and Mr. Burton, who have—they are extremely experienced criminal attorneys in defense matters.

The parties were warned by this court in the very beginning in July of 1982 about the conflict of interest, and it was apparent that they thoroughly understood what we were talking about. This was not something that was called to their attention because this court called it to their attention, and the record will so show. I think it was July 30th, 1982. Might have been August the 30th. But the record will show.

And, of course, you've got all kinds of different theories and versions as to how to defend cases and strategy. Lawyers have different strategies. Certainly this court can't let different lawyers with different strategies come in to change a plea just because of the strategy. But the second thing is there's just no question, in this Court's opinion and according to the record, but what this was a plea by Defendant Carr that was knowingly and voluntarily made. You just can't convince this court that a man of this ability and character and experience in the business world—and, as I have already stated, he was the insurance expert. He had expertise in this field.

Of course, the whole thing—and I think where much of the problem relates to is the particular count, the 6. Maybe you ought to let Mr. Carr pled guilty to one of the mail fraud counts on the insurance policies, and he might not have as much objection to that as he does to the tax matter. Maybe that is where the mistake has been made, if there has been a mistake.

But the evidence is so clear that there was a voluntary, knowing plea on the part of Defendant Carr. And then certainly—and this is not the real reason. Of course, this is a matter that the Court points

out in U.S. versus Presley, and that is where judicial resources would be conserved. There is no question about that. Here is a case of great magnitude. The Court has set aside two to three weeks to try the case, and just a few days before I granted a continuance in a backup case to it because this one was going to take two to three weeks to try, and I had been informed by Mr. Eddins and the attorneys—in fact, daily I asked Mr. Eddins if there was any chance, and I believe it was Saturday night, as I recall—it was already dark. I was home—that he called me and said, "I have got some good news. It looks like we have got a plea agreement worked out, and we may not have to have that two- or three-week trial." And that's the first knowledge this court had of any such situation, and we didn't even get it in time to call off the jurors, as I recall. We had the whole basement jury room full of jurors on that day. Normally, if we think there's going to be a plea agreement, we are not going to trial, all our jurors call in on Friday after 5:00 o'clock. Well, we didn't get any word before Friday at 5:00 o'clock that we were going to have a plea, so we had a number of jurors for this panel here to be—from which this jury was to be selected.

The defendant entered into the plea agreement, and, of course, it goes without saying that still there was a lot of expenditures expended with the jurors and certain witnesses that were already here, not quite all the witnesses were here at the time. But there's no question but what the third element pointed out by Presley, whether judicial resources would be conserved, goes without question.

And another thing: Defendant got the benefit of the plea bargain. This defendant was sitting there with six counts facing him. A jury—he might not have been convicted. I know that. But at least the maximum that he faced went down to a five-year maximum that he can be sentenced on this one count when he was facing, I guess it was, 30. I think that is what it is. It is six counts, and each one had a maximum of five. And then you had the amount of fines. I don't remember at this point. But at least the confinement period went from a possible 30 years down to five years. So the defendant got great benefit from this plea agreement.

In addition to the Presley case, the Court is relying on the case of U.S. versus Ridriguez DeMayo, which is at 674 Fed. 2nd 1122, which is a Fifth Circuit case; the case of U.S. versus Rasmussen, which is 642 Fed. 2nd at 165, which is likewise a Fifth Circuit case.

The Court also relies on United States versus Simmons, which is 497 Fed. 2nd 177, and this is particularly with regard to the issue

of prejudice. And also that same issue of prejudice is the case of United States versus Scarborough, which is 527 Fed. Supplement 380. And then likewise United States versus Barker, which is 514 Fed. 2nd 208.

These are a number of cases that the Court is relying on in refusing to permit the withdrawal of this plea of guilty. There are many, many more factors which this court could state for the record, but I think I stated a number.

Under the facts of this case, it's the feeling of this court that if this defendant is permitted to withdraw his plea of guilty under these set of facts, I dare say that there isn't a plea of guilty that was ever accepted in the courts that couldn't come in and be withdrawn.

For this and all these reasons, the defendant's motion to withdraw—Defendant Carr's motion to withdraw—plea is overruled and denied.

MR. COLVIN: Your Honor, if the Court has concluded its findings of fact, we would, of course, object and except to the Court's ruling respectfully.

THE COURT: Yes, you have your objection.

MR. COLVIN: And at the proper time we may give our notice of appeal.

THE COURT: All right. 6 R. 72-77.

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CLERK

(3)

No. 84-767

In the Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL CARR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government's agreement to accept petitioner's plea proposal only if both he and his co-defendants entered a plea of guilty was improperly coercive.

2. Whether the district court properly denied petitioner's motion to withdraw his plea of guilty under Fed. R. Crim. P. 32(d).

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 8

Conclusion 15

TABLE OF AUTHORITIES

Cases:

Bergen v. *United States,* 145 F.2d 181 13

Bordenkircher v. *Hayes,* 434 U.S. 357 8

Cuyler v. *Sullivan,* 446 U.S. 335 10

Gearhart v. *United States,* 272 F.2d 499 13

Glasser v. *United States,* 315 U.S. 60 10

Harman v. *Mohn,* 683 F.2d 834 ..... 8, 9

Shushan v. *United States,* 117 F.2d 110, cert. denied, 313 U.S. 574 14

United States v. *Barker,* 514 F.2d 208, cert. denied, 421 U.S. 1013 13

United States v. *Castello,* 724 F.2d 813, cert. denied, No. 83-6475 (June 18, 1984) 8, 9

United States v. *Nuckols,* 606 F.2d 566 8

United States v. *Schewfelt,* 455 F.2d 836, cert. denied, 404 U.S. 944 14

United States v. *Schubert,* 728 F.2d 1364 13

Page

Cases—Continued:

United States v. *Tursi,* 576 F.2d 396 8

United States v. *Usher,* 703 F.2d 956 ..... 8, 9

Statutes and rules:

18 U.S.C. 371 2

18 U.S.C. 1341 3

Fed. R. Crim. P. :

Rule 11 ..... 4, 6

Rule 11(f) 8

Rule 32(d) 6, 12, 13

Rule 44(b) 10

Rule 44(c) 10

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-1 to 1-15) is reported at 740 F.2d 339.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1984. A petition for rehearing was denied on September 18, 1984 (Pet. App. 2-1). The petition for a writ of certiorari was filed on November 9, 1984. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Pursuant to a plea agreement in the United States District Court for the Northern District of Texas, petitioner and co-defendants Donald T. McDevitt and Keith D. Kantor were convicted of conspiracy to defraud the United States by impeding the functions of the Internal Revenue

Service, in violation of 18 U.S.C. 371. Petitioner was sentenced to three years' imprisonment and a $2,500 fine.[1] The court of appeals affirmed.

1. The government's factual resume, in which petitioner concurred (Nov. 1 Tr. 46; Oct. 3 Tr. 44-45, 48-51; Pet. App. 1-2 n.1, 1-3), showed that between November 1978 and July 1982 petitioner and his co-defendants, each of whom was a licensed life insurance agent, conducted schemes to defraud life insurance companies of commissions on insurance policies and to sell false income tax deductions to various business enterprises. The defendants obtained insurance agency contracts with life insurance companies and formed dummy corporations for the purpose of appointing corporate officers who would require large life insurance policies. Using a West Indian bank they had acquired, the defendants transmitted to the insurance carriers false loan commitment letters, promissory notes, and financial statements in order to induce the companies to write the insurance policies and pay them agency commissions. Finally, they falsely represented that they were collecting premiums for the policies when, in fact, they were using the commissions paid to them by the insurers to pay for the insurance.

The tax fraud conspiracy that formed the basis of the guilty pleas evolved during the course of the life insurance commission scheme as a means of avoiding the payment of federal income tax on the fraudulently acquired insurance commissions (Oct. 3 Tr. 7). The fraud was then marketed by petitioner and the co-defendants to third parties as a means of evading tax liability. Under the scheme, the three would enter business consultation contracts with various individuals through a Bahamian corporation. No actual business

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[1]McDevitt was sentenced to three years' imprisonment and fined $2,500. Kantor was sentenced to three years' imprisonment, with all but six months suspended, and fined $2,500.

consultation, however, was ever performed by the defendants or by anyone else. The "consultees" would advance the defendants a "consultation fee" in the amount of their taxable income. The defendants retained ten per cent of the fee as their profit — which they divided among themselves —and returned the remaining 90% in the form of an ostensible loan from their West Indian bank or another entity. The transaction thus made it appear that the "consultees" had legitimate business income tax deductions to offset their taxable incomes. To advance the scheme, petitioner and the co-defendants all met with potential customers, outlined the plan, and induced some of them to participate (*id.* at 37-41).

2. On July 2, 1982, petitioner and the co-defendants were indicted on the tax fraud conspiracy count as well as on five counts of mail fraud, in violation of 18 U.S.C. 1341. Prior to his arraignment, petitioner was represented by Robert S. Travis of Fort Worth, Texas. However, when Travis learned that one of the insurance companies that the defendants had allegedly defrauded was also a client of his firm, he withdrew. See July 16 Tr. 8-9; Nov. 1 Tr. 18-19. Accordingly, petitioner appeared at his arraignment without counsel, whereupon the court entered a plea of not guilty on his behalf and directed him to secure a new attorney (July 16 Tr. 18, 20).

During a proceeding on July 23, petitioner informed the court that he had retained Charles Burton and Roy Minton to represent him. On July 30, the two attorneys, who were also representing co-defendant McDevitt (himself an attorney), entered their appearances. At the outset of a hearing on that date, the court inquired concerning a possible conflict of interest resulting from the dual representation of petitioner and McDevitt. Minton assured the court that he could discern no conflict of interest but that, if any conflict existed, his clients would waive it. Both petitioner and

McDevitt concurred in this representation. Pet. App. 1-3; July 30 Tr. 6-7.

After the court granted several defense motions for continuances, trial was scheduled to commence on Monday, October 3, 1983. It was expected to last two or three weeks. However, during the weekend of October 1 the prosecutor and counsel for the three defendants negotiated a plea agreement and agreed upon a factual resume to support the anticipated plea. Accordingly, on the morning the trial was to begin, counsel for the defendants announced that their clients had agreed to enter pleas of guilty to the tax fraud conspiracy count in exchange for dismissal of the mail fraud counts (Oct. 3 Tr. 2). The government's obligation to each defendant under the agreement was conditioned upon entry of pleas of guilty by all three defendants on the conspiracy count, a condition petitioner terms an "all or none" requirement.

During an inquiry conducted pursuant to Fed. R. Crim. P. 11, petitioner stated that he had entered the plea of guilty voluntarily and without coercion or pressure; that he fully understood the elements of the offense to which he entered the plea and the nature of the charges against him; and that he "did * * * whatever [he was] charged with doing." Accordingly, the district court found that the plea was "knowingly and understandingly made" and entered a finding of guilty. Oct. 3 Tr. 25-26, 43-45.

On October 5, petitioner visited Travis, his former attorney, for advice. During the meeting, Travis told him that the fact that he participated in the scheme on the basis of "what [co-defendant] McDevitt told him to do * * * would be a point in his favor" (Oct. 28 Tr. 25) and referred petitioner to his present attorney, Emmitt Colvin, for further advice.

On October 24, petitioner filed a motion to substitute Colvin for Burton as his attorney, and on October 25 — 22 days after entry of the guilty plea — he filed a motion to withdraw his plea of guilty. The withdrawal motion was predicated on two grounds: that he had a viable defense of which he had not been previously aware, and that the guilty plea was coerced because the plea agreement was contingent upon entry of pleas of guilty by all three co-defendants (Pet. App. 1-4). To support the motion, petitioner executed an affidavit stating that "[a]t all times during the indictment period I was advised by [co-defendant] Don McDevitt [an attorney] and other attorneys that the transactions in which I was involved and upon which I acted were legal." He also averred that, although Burton had questioned him concerning reliance upon such advice, Burton failed to inform him that advice of counsel could constitute a defense to the charges in question. See Affidavit in Support of Petitioner's Motion to Withdraw Plea of Guilty.

On November 1, after granting petitioner's motion to substitute counsel, the district court conducted a hearing on the motion to withdraw the guilty plea. During the hearing, Burton denied that appellant ever suggested to him that, in commiting the offenses charged, "he was seeking advice from Mr. McDevitt in an attorney/client relationship or that he was acting on advice from Mr. McDevitt as an attorney." He explained that in none of his extensive discussions with petitioner and the co-defendants "did it appear to me or occur to me nor did [petitioner] advance the theory or suggest to me that he was seeking advice from Mr. McDevitt as an attorney." Nov. 1 Tr. 35. Although Burton conducted extensive discovery over a 15 month period, he "never saw in this case or the facts of the case an instance where advice of counsel would be a defense" (*id.* at 38). Elaborating further, Burton stated that his perception of the facts was that, throughout the scheme, petitioner and

McDevitt were acting as joint venturers. He therefore "did not view [petitioner] and Mr. McDevitt as having an attorney/client relationship, insofar as the events for which they were indicted and tried" were concerned (*id.* at 41; see *id.* at 50). Addressing petitioner's claim that his plea of guilty was the result of coercion induced by the "all or none" plea agreement, Burton stated that neither he nor anyone else to his knowledge exerted any pressure or coercion of any kind to induce appellant to plead guilty (*id.* at 43).

After reviewing petitioner's responses to questions asked during the plea inquiry under Fed. R. Crim. P. 11, the district judge stated that he had observed petitioner's demeanor during that inquiry and that "[t]here was just no question in the Court's mind but what everyone thoroughly and clearly understood what was being said, what was done in this case as I accepted the plea of guilty" (Nov. 1 Tr. 72). The judge also observed that "[l]awyers have different strategies. Certainly this court can't let different lawyers with different strategies come in to change a plea just because of the strategy" (Pet. Supp. App. 1; Nov. 1 Tr. 73). Reviewing applicable precedents and "the facts of this case," the district court concluded (Pet. Supp. App. 3; Nov. 1 Tr. 76):

> if this defendant is permitted to withdraw his plea of guilty under these set of facts, I dare say that there isn't a plea of guilty that was ever accepted in the courts that couldn't * * * be withdrawn.

The motion was denied.

3. Applying a multi-factor analysis for determining whether withdrawal of the plea prior to sentencing was based upon "any fair and just reason" (Pet. App. 1-5 to 1-6; see Fed. R. Crim. P. 32(d)), the court of appeals held that the district court did not err in denying petitioner's motion to withdraw his guilty plea. In particular, the court found

that the motion was not promptly filed because 22 days elapsed after the plea of guilty was entered, a lapse suggesting that the motion was the result of a change of tactics rather than a bona fide belief that the guilty plea was not knowingly entered (Pet. App. 1-7). The court of appeals also observed that permitting withdrawal of the plea and rescheduling the case for trial would have substantially inconvenienced the court by disrupting its docket. In addition, it noted that, throughout the proceedings, petitioner "had close assistance of highly effective counsel" (*ibid.*).[2] Finally, the court held that petitioner had no valid excuse for not presenting earlier the defense that formed the basis for the withdrawal motion. Addressing petitioner's contention that he did not proffer the defense earlier because his trial attorney did not inform him that such a defense was possible, it stated that "[t]he evidence overwhelmingly indicates * * * that the reason that his attorney did not advise him of such a defense is that such a defense was beyond the realm of a legally cognizable defense under the facts of this case" (*id.* at 1-9 to 1-10).

The court of appeals also rejected petitioner's contention that his plea of guilty was not entered knowingly and intelligently because of the conditions of the "all or none" plea agreement. The court observed that, during the guilty plea inquiry, petitioner stated that he understood the charges against him and the elements of the offense and admitted commission of the acts forming the basis of the charge. Noting the district court's observation during the hearing on the motion to withdraw the plea of guilty that petitioner thoroughly understood the proceedings, the court below concluded that petitioner "entered a knowing and voluntary plea agreement" (Pet. App. 1-8; see also *id.* at 1-15).

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[2]The district court had previously observed that petitioner's trial counsel were two of the most experienced criminal defense attorneys in the State of Texas (Pet. App. 1-7).

Finally, the court rejected petitioner's argument that the "all or none" requirement of the agreement placed his attorney, who was also representing McDevitt, in a position of conflict of interest.[3]

ARGUMENT

1. Petitioner contends (Pet. 7-10) that a guilty plea agreement in a multi-defendant case, in which the receipt of benefits by any single defendant is conditioned upon entry of a plea by each of the co-defendants, is inherently coercive and renders the plea involuntary. This claim is plainly without merit.

In *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 n.8 (1978), the Court observed that plea bargains involving adverse or lenient treatment for some person other than the accused "might pose a greater danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider." The courts of appeals that have addressed the issue since *Bordenkircher* have uniformly held that plea bargain agreements that require entry of a plea by each of several co-defendants as a condition for leniency toward any of them or that otherwise confer benefits on third persons are not coercive per se or inherently involuntary. See *United States* v. *Castello*, 724 F.2d 813, 814-815 (9th Cir. 1984), cert. denied, No. 83-6475 (June 18, 1984); *United States* v. *Usher*, 703 F.2d 956, 958 (6th Cir. 1983); *Harman* v. *Mohn*, 683 F.2d 834, 837-838 (4th Cir. 1982); see also *United States* v. *Nuckols*, 606 F.2d 566, 569 (5th Cir. 1979); *United States* v. *Tursi*, 576 F.2d 396, 398 (1st Cir. 1978). As

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[3]The court below also rejected petitioner's claims that his trial counsel provided ineffective assistance due to failure to explore and develop the defense; that the district court failed to comply with the requirements of Fed. R. Crim. P. 11(f) in accepting his guilty plea; and that the plea was not entered voluntarily, knowingly, and intelligently. Pet. App. 1-11 to 1-15.

the court explained in *Harman*, 683 F.2d at 837, "[there is] no intrinsic constitutional infirmity in broadening plea negotiations so as to permit third party beneficiaries." In such cases, the trial court need merely make a more careful examination of the voluntariness of the plea. See *United States* v. *Castello*, 724 F.2d at 815; *Harman* v. *Mohn*, 683 F.2d at 837 (collecting cases); see also *United States* v. *Usher*, 703 F.2d at 958.[4]

While a conditional plea agreement of this nature might in some circumstances give rise to the claim that one of several co-defendants coerced another into entry of a plea of guilty in order to obtain its benefits, such a claim should be tested on the facts of the individual case. Here, the district court expressly inquired whether petitioner's plea was voluntary and whether anyone had forced or threatened him to enter the plea. Petitioner expressly rejected such possibilities and acknowledged that he was entering the plea solely because he was guilty. Oct. 3 Tr. 25. Subsequently, during the hearing on the motion to withdraw the plea, petitioner's trial attorney testified without contradiction that neither he nor anyone else exerted any pressure on petitioner to induce him to plead guilty (Nov. 1 Tr. 43). The court below therefore properly concluded that, despite the "all or none" condition of the plea bargain, petitioner's plea was entirely voluntary (Pet. App. 1-8).

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[4]Petitioner's suggestion (Pet. 9) that it would be "quick, clean, simple and painless" to "outlaw" the practice of "all or none" plea agreements is obviously mistaken. In cases in which the evidence against each defendant is largely the same, the government would often gain little or nothing from a bargain that eliminates the need for trial of one, but not all, defendants. A bargain that eliminates the advantage to one side is a bargain that is not likely to be struck. "Outlawing" the practice would thus work to the disadvantage not just of the government and the public, but also of defendants who desire to reach a plea agreement in such situations.

Nor is there any substance to petitioner's argument that where several defendants are represented by the same attorney, "all or none" plea bargains are "inherently coercive and necessarily create conflicts of interest" (Pet. 8). Although in cases where the culpability of one of several co-defendants is greater than the others or one defendant has a viable defense that is not available to the others, such a plea offer might constitute an incentive to sacrifice the interests of one client to obtain the benefits for the others, where each defendant uniformly stands to gain from participation in the agreement no conflict of interest exists. Indeed, a presumption of a conflict in such cases "would preclude multiple representation even in cases where '[a] common defense * * * gives strength against a common attack.' " *Cuyler* v. *Sullivan*, 446 U.S. 335, 348 (1980), quoting *Glasser* v. *United States*, 315 U.S. 60, 92 (1942) (Frankfurter, J. dissenting).[5]

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[5]"[A]bsent special circumstances * * * trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of a conflict as may exist." *Cuyler* v. *Sullivan*, 446 U.S. at 346. Moreover, Fed. R. Crim. P. 44(c) requires trial courts to inquire as to the propriety of joint representation whenever two or more defendants charged with the same offense and joined for trial are represented by a single retained counsel. Such inquiries will further insulate jointly represented defendants from the possibility that their interests will be compromised by the negotiation of all or none plea agreements. As the court below observed, "the trial court repeatedly and effectively pursued the po[s]sibility of conflict of interest" both during the Rule 44(b) inquiry and during the subsequent hearing to set aside the plea of guilty. On the latter occasion, counsel represented to the court that he was certain no conflict of interest existed even in the face of the plea agreement (Pet. App. 1-13; Nov. 1 Tr. 53-54). Because " '[a]n attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial' " (*Cuyler*, 446 U.S. at 347), the courts below properly accepted the joint representation.

In this case there is no reason to believe that the "all or none" agreement, which petitioner's counsel negotiated, compromised petitioner's interests in the least. The parties' factual resume demonstrates that petitioner and McDevitt were equally culpable in conducting the fictitious tax shelter fraud scheme. As the district court noted (Pet. Supp. App. 2; Nov. 1 Tr. 76), petitioner — no less than his co-defendant — "got great benefit from this plea agreement." The maximum period of confinement was reduced from 30 to 5 years, and the possible fines were also reduced. *Ibid.* And in any event, petitioner expressly and knowingly waived any claim of conflict of interest from the joint representation (Pet. App. 1-3; July 30 Tr. 6-7).

The disposition by the courts below of petitioner's argument was therefore reasonable in light of the facts of the case as well as consistent with the standards followed by other courts of appeals.

2. Petitioner also claims (Pet. 10-11) that, in rejecting his motion to withdraw his plea, the district court improperly assessed the merits of a defense based upon an advice of counsel instruction, and that the court of appeals committed the same error in holding that no fair and just reason had been proffered to justify withdrawal of the plea. This claim is without merit.

a. Petitioner's argument is based on a mischaracterization of the opinion of the court below. The court of appeals did not uphold the district court's denial of petitioner's motion to withdraw his guilty plea on the ground that his proffered defense was meritless. Rather, the court considered eight well-established factors — from which the merit of the proffered defense is conspicuously absent — in reaching its decision. See Pet. App. 1-5 to 1-6. The factors, derived from various court of appeals decisions (see *id.* at 1-5 to 1-6 nn.3-10), are as follows (*id.* at 1-5 to 1-6 (footnotes omitted)):

> (1) whether or not the defendant has asserted his innocence; (2) whether or not the government would suffer prejudice if the withdrawal motion were granted; (3) whether or not the defendant has delayed in filing his withdrawal motion; (4) whether or not the withdrawal would substantially inconvenience the court; (5) whether or not close assistance of counsel was available; (6) whether or not the original plea was knowing and voluntary; and (7) whether or not the withdrawal would waste judicial resources; and [(8)], as applicable, the reason why defenses advanced later were not proffered at the time of the original pleading, or the reasons why a defendant delayed in making his withdrawal motion.

The court of appeals found that petitioner satisfied the first two factors, but that the remaining factors militated strongly against permitting him to withdraw his plea. The judgment was not based on any single factor or factors, but on "the totality of the circumstances and factors involved in this case" (Pet. App. 1-6).

This case therefore does not present the question whether Fed. R. Crim. P. 32(d) permits "an examination of the merits of a defense that is proferred as the 'fair and just' reason for withdrawal of a plea of guilty" (Pet. i). Petitioner does not challenge the multi-factor analysis actually applied by the court of appeals. There is, therefore, no reason for further review.

b. In the course of discussing the last factor quoted above — the reason why petitioner did not earlier proffer the defense now urged as a basis for withdrawal of the plea — the court of appeals rejected petitioner's claim that he did not do so "because his attorney did not inform him that such a defense was possible" (Pet. App. 1-9). The court concluded (*id.* at 1-9 to 1-10) that the "evidence overwhelmingly indicates that the reason that his attorney did not

advise him of such a defense is that such a defense was beyond the realm of a legally cognizable defense under the facts of this case." This conclusion forms the apparent basis for petitioner's claim that the court of appeals impermissibly examined the merits of his proffered defense. See Pet. 10.

Even analyzing this conclusion as if it constituted an independent ground for rejecting petitioner's withdrawal motion — rather than being a factual component of the court's conclusion that petitioner had no valid reason for not presenting any viable defenses on a timely basis — it accords with settled principles of law. Petitioner correctly points out (Pet. 10), citing, inter alia, *United States* v. *Schubert*, 728 F.2d 1364, 1366 (11th Cir. 1984), *Gearhart* v. *United States*, 272 F.2d 499, 502 (D.C. Cir. 1959), and *Bergen* v. *United States*, 145 F.2d 181 (8th Cir. 1944), that a court may not ordinarily inquire into the merits of a newly-discovered defense proffered as a basis for a motion to withdraw from a plea agreement under Fed. R. Crim. P. 32(d). However, it is generally held that when the factual basis for the proffered defense upon which the motion is based fails to establish a defense as a matter of law, the motion may properly be denied on that ground. As the court explained in *United States* v. *Barker*, 514 F.2d 208, 220 (D.C. Cir.), cert. denied, 421 U.S. 1013 (1975), "[i]f the movant's factual contentions, when accepted as true, make out no legally cognizable defense to the charges, he has not effectively denied his culpability, and his withdrawal motion need not be granted". See *United States* v. *Schubert*, 728 F.2d at 1366-1367 (distinguishing *Barker*).

Here, the courts below properly concluded that, even if taken as true, petitioner's averment that his criminal activities were based upon McDevitt's legal advice to him would not, as a matter of law, have entitled him to a good faith instruction based upon reliance on the advice of counsel. In

order for such an instruction to be available to a defendant there must be at least some evidence that the attorney advised the defendant within the context of a bona fide attorney-client relationship. Where the uncontroverted evidence shows that the lawyer furnishing the advice is a partner in the criminal enterprise "taking [on] the profits as such, and not a lawyer who had no interest save to give sound advice for a reasonable fee," the advice of counsel defense is unavailable. *Shushan* v. *United States*, 117 F.2d 110, 118 (5th Cir.), cert. denied, 313 U.S. 574 (1941); see also *United States* v. *Schewfelt*, 455 F.2d 836, 839 (9th Cir.), cert. denied, 404 U.S. 944 (1972) (advice of counsel defense unavailable when the attorney in question merely serves to implement the criminal scheme).

In this case the factual resume, which petitioner admitted as true upon entering his plea of guilty, showed that McDevitt was deeply involved in every aspect of the sham tax shelter operation. He signed fictitious consultation contracts on behalf of a dummy corporation, actively promoted the scheme by conducting meetings with potential customers, and shared in the profits of the scheme (Oct. 3 Tr. 38-39, 41-42; Pet. App. 1-11). On these facts there was simply no legally cognizable defense to the charge based upon reliance on the advice of counsel. The court of appeals' recognition of this does not constitute error.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1985

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